SUPREME COURT, U. S.

MAY 22 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

NO. 74-1472

SAM JOHN PASSARELLA,
Petitioner,

v.

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

GEORGE H. SPERRY
110 North Fifth Avenue
P. O. Box 89, Wilmington,
North Carolina - 28401
Attorney for Petitioner

May 16, 1975

Service to be made on:

ZORO J. GUICE
Assistant Attorney General
P. O. Box 25201
Raleigh, North Carolina

I N D E X

History of Record.....1

Jurisdiction.....2

Constitutional Provisions.....3

Questions Presented for Review.....4

Statement of Case.....5

Argument.....12

Conclusion of Argument.....21

Certificate of Service.....24

A-1 Judgment.....i

A-2 Court of Appeals Opinion.....iii

A-3 Superior Court Decision.....ix

A-4 Extension of Time.....xi

A-5 Statutes and Case Citations.....xii

INDEX CONTINUED

STATUTES

Title 28 of the United States Code, Section 1257 (3).....3

Fourth Amendment to the Constitution of the United States ...3, 4, 5, 10, 21 22

Fourteenth Amendment to the Constitution of the United States.....5, 10, 22

CASE CITATIONS

Draper v. United States, 358 U.S. 307, 3 L. ed. 327, 79 S. ct. 329 (1959)....15

Ker v. State of California, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. ct. 1623 (1963).....13

Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 1081, 81 S. ct. 1684 (1961).....12, 21

Miller v. United States, 357 U.S. 301, 313, 2 L. ed. 2d 1332, 1340, 78 S. ct. 1190 (1958).....13

Rios v. United States, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. ct. 1431 (1960).....15

Sgro v. United States, 287 U.S. 206, 77 L. ed. 260, 53 SCR 138 (1932)..16, 17

United States v. Neal, 500 Fed. 2d 305 (1974).....17

United States v. Bradshaw, 490 Fed. 2d 1097 (1947).....18

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

NO._____

SAM JOHN PASSARELLA,
Petitioner,

v.

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

The Petitioner, Sam John Passarella, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the State of North Carolina, said judgment certified on November 18, 1974. Said judgment of the Court of Appeals of the State of North Carolina was appealed to the Supreme Court of North Carolina and also a Petition of Certiorari was included with the appeal

to the Supreme Court of North Carolina, said appeal and Certiorari was denied for lack of a substantial constitutional issue on December 30, 1974. (A-3) That the Petitioner made application for an extension of time for filing this Writ of Certiorari in the United States Supreme Court because of a serious illness and said Petition was granted by the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, extending the time for filing to May 29, 1975. Said extension was granted on the 20th day of March, 1975. (A-4).

JURISDICTION

The date of the certification of the North Carolina Court of Appeals opinion was November 18, 1974. (A-2) The date of the final judgment rendered by the Supreme Court of North Carolina denying certiorari and denying the appeal was December 30, 1974. (A-3) The date of the

order for extending the time for applying for a Writ of Certiorari was March 20, 1975, said extension being until May 29, 1975. (A-4).

That the jurisdiction of the Supreme Court of the United States is invoked in this case by Title 28 of the United States Code Section 1257 (3) in that this writ has been submitted in apt time including the sixty day extension from the date of the judgment of the highest State Court of the State of North Carolina denying Defendant's appeal from the Court of Appeals of North Carolina and denying the Defendant's Writ of Certiorari from the Court of Appeals of North Carolina.

CONSTITUTIONAL PROVISIONS

The above-entitled case involves the denial of the Defendant's right against an unreasonable search and seizure of his person as guaranteed by the Fourth Amendment of the United States Constitution

set out as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The Fourth Amendment was applied to the State of North Carolina by the Fourteenth Amendment to the Constitution of the United States Paragraph 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Did the trial Court commit error in denying the Defendant's motion to suppress the evidence that was introduced at the

trial, because said evidence was obtained by unlawful and unreasonable search and seizure denying his constitutional rights under the Fourth and Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This was a criminal action instituted in the Superior Court of the General Court of Justice of New Hanover County, Wilmington, North Carolina, in where the Defendant was tried upon an indictment charging him with the crime of feloniously possessing cocaine with intent to distribute it. Upon his plea of not guilty, a voir dire examination was held to test the validity of the search of the Defendant's person. The testimony on the voir dire was as follows:

Mr. John K. Walker, an S.B.I. agent for the State of North Carolina testified that on September 18, 1973, he saw the Defendant in Fayetteville, North Carolina in the presence of two white males in a

vehicle. That he came to Wilmington and met another S.B.I. agent relying upon information from a confidential source he had received in Fayetteville, North Carolina, that the Petitioner was coming to the Wilmington area and also that he had narcotics in his possession. He further testified that he knew the confidential source and he had given him information in the past that had proven to be true and correct and that he gave him the information during the A.M. hours on the 18th day of September.

The S.B.I. officer Walker further testified that the first time he saw Mr. Passarella was on Third Street in the City of Wilmington, traveling in a northern direction with two other subjects with him. That he and the other S.B.I. agent stopped the vehicle on Highway 117, in the City Limits of Wilmington, and advised the Petitioner and the other passengers that

they were law enforcement officers and told them of his purpose. That they had information from a confidential source that Mr. Passarella was in possession of narcotics or that somewhere in the vehicle there were narcotics and they were going to conduct an emergency search of the passengers in the vehicle and the vehicle for narcotics. That the vehicle was stopped at a Texaco Service Station and one of the passengers was taken in the service station by an S.B.I. agent and Officer Bill Wolak of the Wilmington Police Department and was searched. Walker testified that he then received information from the same confidential source that a few minutes before the vehicle was stopped the confidential source had seen a controlled substance in the vehicle. Based on this information all of the officers and the Defendant were removed to the

Sheriff's Department and they obtained a search warrant for the Defendant and other officers searched him in a room of the jail and found the evidence in this case, cocaine.

Counsel for Petitioner read the affidavit and the search warrant which on the face of it showed that the officer received the information for the basis of the search warrant for the person of Petitioner in the A.M. hours into the record. Walker testified that it was a mistake and a misunderstanding.

Officer Wolak, one of the police officers immediately at the scene testified that he searched Sam Passarella, the Petitioner, at the Texaco Service Station on September 18, 1973, and that he stripped him of all of his clothing, including his underwear and socks. He further testified that he and the S.B.I. agent asked him to bend over and examined him in the rear portion

of his body and that he did not recall looking all through his hair but it was possible. He further testified that he did not find any kind of controlled substance on his person or his clothes. He testified that he searched him as best he could with the space available in the restroom. Officer Wolak further testified that he was not the officer making the determination as to whether to take him to the Police Station and search him where there would be plenty of room and space.

The S.B.I., Officer Walker further testified that in the affidavit for the search warrant of the Petitioner's person there was nothing mentioned about the car or searching the Petitioner earlier at the service station. He further testified that he searched him at the service station at approximately 3:30 P.M. and did not get the search warrant for his person until

5:00 o'clock P.M. He further testified in his opinion the Petitioner would not have been able to leave between the time they stopped him at 3:30 P.M. and the time the warrant was taken at 5:00 o'clock, however, nowhere in the testimony is there any evidence that Mr. Passarella at any time was placed under arrest until the narcotic substance cocaine was found in his pocket after the search warrant was obtained and the search of his person was made in the jail. The Trial Court of the Superior Court of the General Court of Justice for New Hanover County overruled the Defendant's motion to suppress this evidence because it was illegally obtained by an unlawful search and in violation of his constitutional rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

The trial went forward with the evidence presented over the Petitioner's ob-

jection, and the Defendant was ultimately convicted of possession of cocaine with intent to distribute and sentenced to not less than three nor more than five years in the common jail of New Hanover County. (A 1). The Defendant in open Court gave notice of appeal to the North Carolina State Court of Appeals and followed up his appeal but the Court of Appeals entered judgment certified on November 18, 1974 denying his appeal and upholding the conviction. (A 2). The Defendant in apt time gave notice of appeal and in the same notice applied for Writ of Certiorari to the State of North Carolina Supreme Court for a hearing on the constitutional issue of whether there was unreasonable search and seizure of the Defendant's person. Said notice of appeal and Writ of Certiorari was denied by judgment of the Supreme Court of North Carolina on December 30, 1974. (A 3). The Defendant then applied for an extension

of time to the Supreme Court of the United States due to illness of Petitioner's counsel, said extension of time being granted by the Honorable Chief Justice of the United States Warren E. Burger on March 20, 1975 giving the Petitioner until May 29, 1975 to file his Writ of Certiorari on these constitutional questions. (A-4).

ARGUMENT OF COUNSEL AS TO
THE FACTS AND LAW OF THE QUESTION

BRIEF

It is well settled that since Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. ct. 1684 (1961), that as a matter of due process evidence obtained by a search and seizure in violation of the Fourth Amendment is admissable in State Court as it is in a Federal Court.

In Mapp v. Ohio, supra, Mr. Justice Clark stated that there could be no fixed formula as we are admittedly met with

recurring questions of the reasonableness of searches. He went on to comment "however much in a particular case insisted upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." He cited Miller v. United States, 357 U.S. 301, 313, 2 L. ed. 2d 1332, 1340, 78 S. ct. 1190 (1958) as authority for that quotation.

In Ker v. State of California, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. ct. 1623 (1963), the Court said "while the language of the amendment is general it forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent". U.S. 33, 374 U.S.P. 33, 10 L. 2d P. 737. The Court in Ker v. State of California, supra, went on to state that the reasonable-

ness of a search is in the first instance a substantiative determination to be made by the trial Court but findings of reasonableness are respected only in so far as consistent with Federal constitutional guarantees and are not insulated from examination of the Supreme Court.

I cite the above cases as illustrations that the Supreme Court has always held the right of an individual against unreasonable search and seizures as being a very dear one and any infringement to be examined carefully. It is well documented that every allegation of an illegal search and seizure must be judged on its own facts and merits and that there are no set rules to go by. There is no question that the Supreme Court has ruled that if you have probable cause sufficient to get a search warrant you can stop and search an individual if the circumstances dictate. And that the probable cause

is dictated by factual and practical considerations of everyday life on which reasonable and prudent men act. Draper v. United States, 358 U.S. 307, 3 L. ed. 327, 79 S. ct. 329 (1959).

In the above case there is no question that the S.B.I. officers were proper in the original search of the Petitioner, the car and other persons. The Petitioner concedes that is the Federal law and also the law of the State of North Carolina.

However, the Petitioner asks the Court to examine the totality of the situation and consider all of the circumstances before deciding whether the second search with the warrant was reasonable or unreasonable.

The Petitioner cites a recent case Rios v. United States, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. ct. 1431 (1960), in which the Court stated that as in most cases of search and seizures resolution

of the question requires a particularized evaluation of the conduct of the officers involved. The Petitioner realizes that there is no factual similarity in that case with the case that is the subject of this writ but cites it for the reasoning and guidelines that the Petitioner hopes the Court will follow in examining this particular case.

In Sgro v. United States, 287 U.S. 206, 77 L. ed. 260, 53 SCR 138 (1932), the Court stated that the proceeding by search warrant is a drastic one and that its abuse led to the adoption of the Fourth Amendment and should be liberally construed in favor of the individual. In that case there was an issuance of a second warrant only by changing the date and the conviction was reversed. The Petitioner again says that does not meet the factual situation here but it gives an insight as to the

Court's feeling on search warrants and the importance of that power not being abused.

Sgro v. United States, supra, was cited in United States v. Neal, 500 Fed. 2d 305, (1974), which reiterated the general principle that the Fourth Amendment contemplates probable cause for the issue the search warrant to exist at the time the search is sought to be made.

The Petitioner argues that in the present case the police officers took advantage of his rights in that they had two bites at the apple. They had plenty of officers and stopped the Petitioner's car at a place of their choosing. They made an emergency search which the Petitioner concedes was valid, under conditions of their choice and a place of their choice. There is nothing appearing in the record to keep them from transporting the Petitioner and the vehicle to the jail for search

or for the purpose of getting a search warrant for the vehicle and the person of the Petitioner.

In United States v. Bradshaw, 490 Fed. 2d 1097 (1974) the Court held "to summarize, we hold that, since two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence, the search and seizure in this case violated the Fourth Amendment that the fruits thereof should have been suppressed". This was a North Carolina United States District Court for the Western District of North Carolina where three officers went on the Defendant's premises walked to his car and smelled the moonshine and then conducted a plain view search and confiscated moonshine in the vehicle.

In comparing this case to this case it would seem there is a good parallel

in that there was nothing to keep the officers from holding the Petitioner in custody as they did and taking him to proper facilities for search or holding him and getting a warrant for his person and searching him.

The Court of Appeals of North Carolina in their decision said that the police officers of North Carolina have the right to stop an individual on a valid emergency search and then upon not finding anything are able to hold him for approximately two hours and obtained a search warrant for his body based on the same information that they had to base their emergency search on. If this is going to be the law of the State of North Carolina and the rest of the nation then I feel we are giving the police officers unlimited privilege to treat the citizens as they wish if they have information from a reliable source that they have in their pos-

session narcotics. I argue that the reason this question has never been decided is that the facts in this particular case are so unusual that it has never had to be considered before.

If the decision of the Court of Appeals of North Carolina is allowed to stand, then in effect you are saying that a police officer on reliable information can stop an individual and search him completely at a place of his choice and upon finding nothing can hold him and upon the same information that was given to him to start with being reiterated the second time by the same informant can get a search warrant for his person and search him again. Following this theory of law what would keep the police officer from holding an individual indefinitely as long as the same informer kept telling that I saw the narcotics on him before you stopped him, over and over again? Following this

theory every time he told him this he could take out another search warrant and search his body.

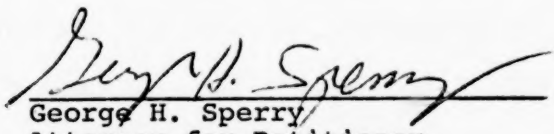
I argue that this type of conduct by law enforcement officers is exactly what the Fourth Amendment was passed for and exactly what the Federal Courts have based their opinions on in regulating the searches and seizures of individuals, examining each case closely as to all of the facts and circumstances surrounding the search as to whether it was unreasonable or not.

CONCLUSION OF ARGUMENT

In conclusion I argue that based on the basic theories that the Court has expanded on search and seizures before and after Mapp v. Ohio, supra, upon consideration of all of the facts and circumstances surrounding this search and seizure including the conduct of the police officers

it should reverse the opinion of the North Carolina Court of Appeals, and hold that this particular search was unreasonable considering all of the circumstances. The Petitioner asserts that this particular factual situation and ruling of the Court of Appeals of the State of North Carolina is a ruling on the application of the Fourth and Fourteenth Amendments to the Constitution of the United States to an individual of this country which has not been ruled on before in any jurisdiction and which raises a substantial constitutional question as to whether the Petitioner was subjected to an unreasonable search and seizure and is worthy of consideration by this Court. Petitioner further asserts the North Carolina Court of Appeals did not decide the question in

agreement with prior decisions of the Supreme Court of the United States.



George H. Sperry
Attorney for Petitioner
110 North Fifth Avenue
Wilmington, North Carolina
28401

OPPOSING COUNSEL:

ZORO J. GUICE
Assistant Attorney General
P. O. Box 25201
Raleigh, North Carolina

CERTIFICATE OF SERVICE

This is to certify that I have this 21st day of May, 1975, served 3 copies of the Petition for Writ of Certiorari in the Supreme Court of the United States upon Mr. Zoro J. Guice, Jr., Assistant Attorney General, State of North Carolina, Department of Justice, P. O. Box 25201, Raleigh, North Carolina, in the case of State of North Carolina vs. Sam John Passarella, 745 SC 756, by depositing three (3) copies in the U. S. Mails with first class postage prepaid.

George H. Sperry

STATE OF NORTH CAROLINA File #73-CR-15491
IN THE GENERAL COURT
COUNTY OF NEW HANOVER OF JUSTICE
SUPERIOR COURT DIVISION

The State of North Carolina

VS. CORRECTED JUDGMENT AND COMMITMENT

Sam John Passarella.

Name, age, sex and race of Defendant

White, Male

In open Court, the defendant appeared for trial upon the charge or charges of possession with intent to distribute cocaine and thereupon entered a plea of not guilty.

Having been found guilty of the offense of possession with intent to distribute cocaine by a jury which is a violation of and of the grade of felony.

It is ADJUDGED that the defendant be imprisoned for the term of not less than three (3) nor more than five (5) years in the Common Jail of New Hanover County assigned to work under the supervision of the North Carolina Department of Correction.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 24th day of June, 1974.

/s/ L. Bradford Tillery
Presiding Judge

Attorney for Defendant: George H. Sperry

Attorney for the State: W. A. Cobb

Date certified copies of judgment delivered to Sheriff for commitment: 6-25-74

No. 745SC756 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

V. From New Hanover

SAM JOHN PASSAREALLA

Appeal by defendant from Tillery, Judge, 1 April 1974 Session of Superior Court held in New Hanover County. Heard in the Court of Appeals 15 October 1974.

Defendant was charged with possession with intent to distribute a controlled substance, cocaine, in violation of G.S. 90-95 (a)(1). Upon the jury's verdict of guilty, the trial judge imposed a sentence of not less than three years nor more than five years.

The State presented evidence which tended to show that law enforcement officers were advised by a previously reliable confidential informant that defendant had controlled substances in his possession; that on the basis of this information

officers stopped an automobile in which the defendant was riding in Wilmington, North Carolina; that officers immediately conducted a strip search of defendant and all other occupants of the automobile in the restroom of a nearby service station but found no controlled substances; that following the search, officers received additional new information from the same confidential informant that he had observed a controlled substance on defendant's person a short time before the automobile was stopped; that on the basis of this new information officers took the defendant to the New Hanover Sheriff's Department where they obtained a search warrant for his person; and that officers conducted a second and more thorough search of defendant pursuant to the search warrant and found controlled substances on his person in violation of the law.

The defendant did not testify in this case nor offer any evidence. By way of cross-examination of the State's witnesses, however, defendant brought out evidence tending to show that of the three men who were in the automobile he was the only one served with a search warrant and that he was the only one who was carried to the jail and caused to be stripped of his clothing and his body searched; that the rest room in which he initially was searched was not a place of his own choosing; and, finally, that after he was taken to the Sheriff's Department, a considerable time period elapsed before the materials which were offered into evidence were discovered.

Attorney General Carson, by Deputy Attorney General White and Assistant Attorney General Guice, for the State.

Burney, Burney, Sperry & Barefoot, by George H. Sperry for defendant appellant.

MORRIS, Judge. Defendant's only assignment of error relates to the denial of his motion to suppress the evidence that was introduced at trial. He does not contest the validity of the original search, but argues that the subsequent search of his person violated his constitutional rights against unreasonable searches and seizures. Defendant maintains that in these circumstances officers had the right either to search him immediately or take him to the courthouse, get a search warrant and then conduct a search. He argues that officers cannot be allowed to do both. We find no merit in this contention.

Defendant's broad assertion is unsupported by applicable law, nor do we feel such a rule should be the law. In our opinion, to require the officers to make such an election under these circumstances would place too heavy a burden

on law enforcement officers in the detection and investigation of criminal conduct. We conclude it would be neither reasonable nor practical to bind law enforcement officers to an election.

Additionally, we note that on voir dire the trial judge in this case made extensive findings of fact and based on these findings concluded as a matter of law that the serach of the defendant was valid. "These findings of fact by the trial judge are conclusive when, as here, they are supported by competent evidence." State v. Bass, 280 N.C. 435, 445, 186 S.E. 2d 384 (1972), and cases cited therein.

The trial judge's findings in this case support the conclusion that the officers had reasonable ground to believe that a felony had been committed by the defendant and that he might escape if he were not carried to the Sheriff's Department and a more extensive search conducted,

the officer having testified and the court having found as a fact that because of the restricted area of the room and the size of the occupants, the body search conducted in the rest room was not a thorough search. The new or additional information received from the informer was additional reason for a more thorough search.

No error.

Judges HEDRICK and BALEY concur.

NO. 6 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA	)	JUDGMENT DISMISSING TRIAL
v	)	
SAM JOHN PASSARELLA	)	(745SC756)

****

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed:

And it is considered and adjudged further that the defendant do pay the sum of THIRTY-SIX AND 15/100 ($36.15) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this the 30th day of December, 1974.

Adrian J. Newton
Clerk of the Supreme Court
of North Carolina

BY:

/s/ John R. Morgan
Assistant Clerk

cc:
Burney, Burney, Sperry & Barefoot,
Attorneys at Law
R. Bruce White, Jr., Deputy Attorney General
Zoro J. Guice, Jr., Assistant Attorney General
W. Allen Cobb, District Attorney

SUPREME COURT OF THE UNITED STATES

No. A-759

SAM JOHN PASSARELLA,
Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME
TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including May 29, 1975.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 20th day of March, 1975.

STATUTES

Title 28 of the United States Code, Section 1257 (3)

Fourth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

CASE CITATIONS

Draper v. United States, 358 U.S. 307, 3 L. ed. 327, 79 S. ct. 329 (1959)

Ker v. State of California, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. ct. 1623 (1963)

Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 1081, 81 S. ct. 1684 (1961)

Miller v. United States, 357 U.S. 301, 313, 2 L. ed. 2d 1332, 1340, 78 S. ct. 1190 (1958)

Rios v. United States, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. ct. 1431 (1960)

Sgro v. United States, 287 U.S. 206, 77 L. ed. 260, 53 SCR 138 (1932)

United States v. Neal, 500 Fed. 2d 305 (1974)

United States v. Bradshaw, 490 Fed. 2d 1097 (1947)

INDEX

TABLE OF AUTHORITIES ii

ANSWER TO PETITION 1

JURISDICTION 3

CONSTITUTIONAL PROVISIONS 3

QUESTION PRESENTED FOR REVIEW. 3

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION OF ARGUMENT 11

CERTIFICATE OF SERVICE 13

Appendices

A-1 Judgment and Commitment 14

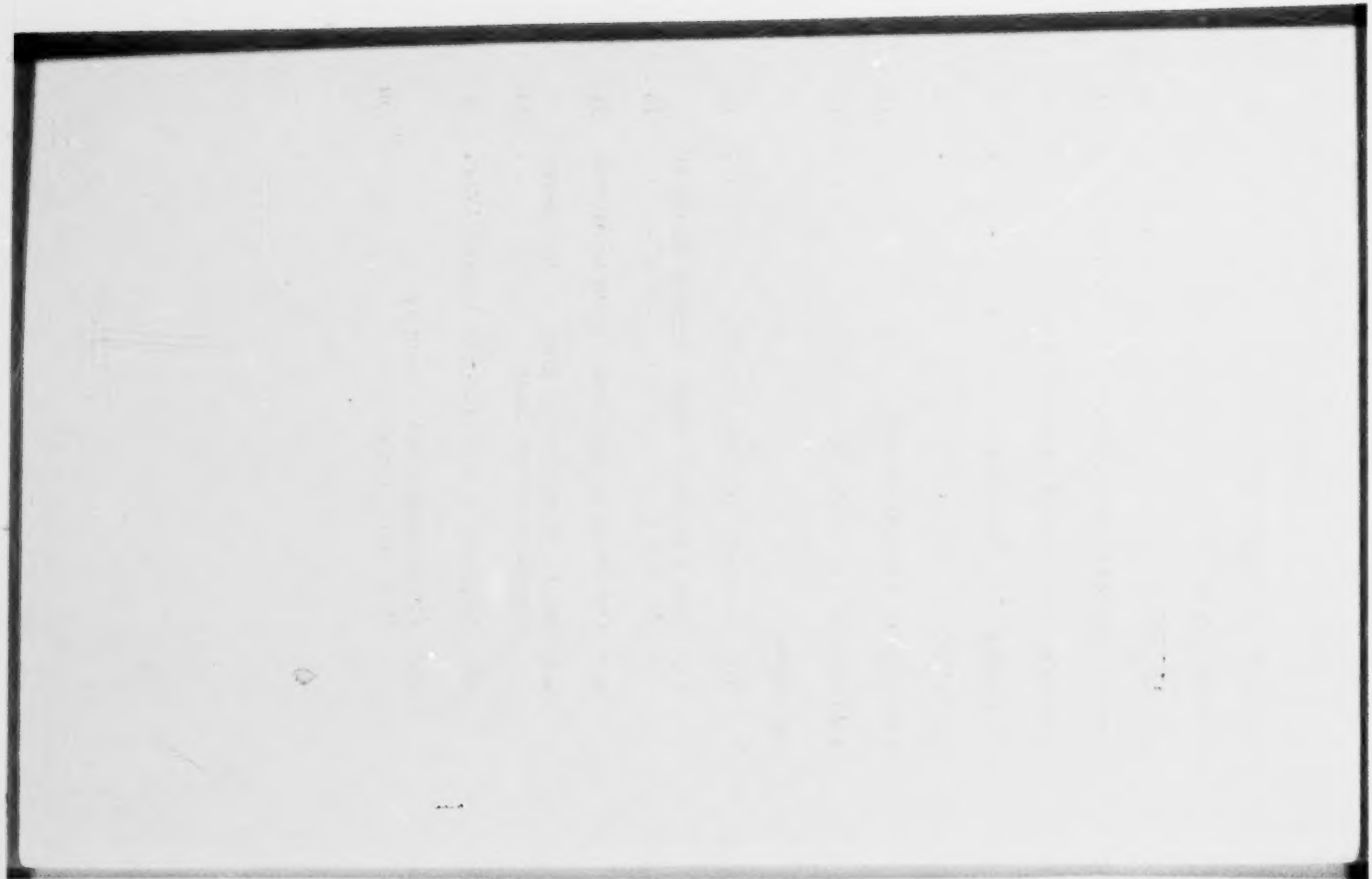
A-2 State's Brief in North Carolina Court of Appeals 15

A-3 Opinion of North Carolina Court of Appeals. 21

A-4 State's Supplemental Brief in the North Carolina Supreme Court 24

A-5 Judgment of North Carolina Supreme Court. 29

A-6 Constitutional and Statutory Provisions Involved 30



CASE CITATIONS

Carroll v. United States,
267 U.S. 132, 69 L. Ed. 543,
45 S. Ct. 280 (1925) 5

Chambers v. Maroney,
399 U.S. 42, 26 L. Ed. 2d 419,
90 S. Ct. 1975 (1970). 5

Draper v. United States,
358 U.S. 307, 3 L. Ed. 327,
79 S. Ct. 329 (1959) 7, 9

Gilliam v. United States,
189 F. 2d 321 (6th Cir. 1951) 8

Ker v. State of California,
374 U.S. 23, 10 L. Ed. 2d 726,
83 S. Ct. 1623 (1963). 4, 6

McCray v. Illinois,
386 U.S. 300, 18 L. Ed. 2d 62,
87 S. Ct. 1056 (1967). 7

Mapp v. Ohio,
367 U.S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961). 4

Miller v. United States,
357 U.S. 301, 2 L. Ed. 2d 1332,
78 S. Ct. 1190 (1958). 4

Petteway v. United States,
261 F. 2d 53 (4th Cir. 1958). 8

Rios v. United States,
364 U.S. 253, 4 L. Ed. 2d 1688,
80 S. Ct. 1431 (1960). 8

Sgro v. United States,
287 U.S. 206, 77 L. Ed. 260,
53 S. Ct. 138 (1932) 8

United States v. Bradshaw,
490 F. 2d 1097 (4th Cir. 1974) 5

United States v. Gonori,
437 F. 2d 312 (4th Cir. 1971) 8

United States v. Neal,
500 F. 2d 305 (10th Cir. 1974) 8

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States 3

Fourth Amendment to the Constitution of the United States 3, 4, 5, 6, 10

Title 28 of the United States Code, Section 1257 (3) 3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 74-1472

SAM JOHN PASSARELLA,
Petitioner

v.

STATE OF NORTH CAROLINA
Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

TO: THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES RUFUS L. EDMISTEN, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, and for his Answer to the Petition for Writ of Certiorari to the United States Supreme Court filed by the petitioner in the above entitled cause says:

1. That the decision by the North Carolina Court of Appeals was unanimous and that the decision of the North Carolina Supreme Court denying the petitioner's appeal and Petition for Writ of Certiorari to that Court was unanimous.

2. That the Petition for Writ of Certiorari to this Court should be denied in that the decision of the North Carolina Court of Appeals and of the North Carolina Supreme

Court were not in conflict with any of the decisions of the North Carolina Supreme Court or of the Supreme Court of the United States.

3. That the decisions of the North Carolina Appellate Courts did not result in the denial to the Petitioner of any of his rights guaranteed to him by the laws and Constitution of the State of North Carolina and by the Constitution of the United States.

4. In the Answer to the Petitioners substantive allegations of error, the State of North Carolina says that the Petitioner has failed to show good or just cause for further review and that no such cause exists; that the entire record in this case does not reveal that any of the rights secured to the Petitioner by North Carolina law, the North Carolina Constitution or the United States Constitution were violated; and, there is, therefore, no substantial question arising under the Constitution of the State of North Carolina or the Constitution of the United States. There was sufficient evidence to convict the defendant of the crime with which he stood indicted.

5. The State of North Carolina specifically includes as a part of this Answer the corrected Judgment and Commitment of the Trial Court, the Brief for the State filed in the North Carolina Court of Appeals, the decision of the North Carolina Court of Appeals, the Supplemental Brief for the State filed in the North Carolina Supreme Court, and the Judgment of the North Carolina Supreme Court dismissing the Appeal and Petition for Writ of Certiorari, the said items being in the Appendix and marked respectively as A-1 through A-5.

6. That accompanying this Answer and containing the argument of the State of North Carolina on the facts and law in opposition to the Petition for Writ of Certiorari to the United States Supreme Court is a Brief which follows hereafter.

This the 18 day of June, 1975.

Respectfully Submitted,

RUFUS L. EDMISTEN
Attorney General

R. BRUCE WHITE, JR.
Deputy Attorney General

Guy A. Hamlin
Assistant Attorney General

Zoro J. Guice, Jr.
Assistant Attorney General

JURISDICTION

The Petitioner has correctly invoked the jurisdiction of the Supreme Court of the United States under Title 28 United States Code Section 1257 (3).

CONSTITUTIONAL PROVISIONS

The Petitioner has properly quoted the applicable sections of the Fourth and Fourteenth Amendments to the United States Constitution. The Applicable sections of these Amendments will not be repeated here.

QUESTION PRESENTED FOR REVIEW

Did the Trial Court commit error in denying Defendant's motion to suppress the evidence that was introduced at the trial because said evidence was obtained by unlawful and unreasonable search and seizure denying his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

The statement of the case is set forth in the Petitioner's Brief and in addition a statement of facts is contained in the Brief of the State of North Carolina, A-2, filed in the North

Carolina Court of Appeals. It is believed that a further statement of the facts here would be unnecessary repetition. In addition other pertinent facts are hereafter included in the argument of Counsel.

ARGUMENT OF COUNSEL AS TO THE FACTS AND LAW OF THE QUESTION

BRIEF

The State of North Carolina is well aware of the elementary and basic principle of law that the right of the individual against unreasonable search and seizure is a very dear one and that any infringement is to be examined carefully. This basic protection for the individual which is a vital part of our heritage was so fundamental that it was incorporated into our national Constitution by the Fourth Amendment. Cited by the Petitioner as enumerating and establishing this fundamental protection provided by the Fourth Amendment are the landmark cases of *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961); *Miller v. United States*, 357 U.S. 301, 2 L. Ed. 2d 1332, 78 S. Ct. 1190 (1958); and *Ker v. State of California*, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963). A reading of these cases as well as the numerous other cases involving search and seizure leads one to the conclusion reached by Mr. Justice Clark in *Mapp v. Ohio*, supra, and alluded to by the Petitioner in his Brief that there is no fixed formula applying to every case in determining the reasonableness or unreasonableness of the search. Therefore, the Courts must look carefully at the factual setting of each particular case in determining whether or not the search was reasonable.

In the instant case John K. Walker, a North Carolina State Bureau of Investigation (S.B.I.) Agent, saw the Petitioner in the company of two other individuals in Fayetteville, North Carolina. He received information from a confidential and reliable informer that the Petitioner was coming to the Wilmington, North Carolina area. This S.B.I. Agent returned to Wilmington and after meeting another S.B.I. Agent, named McKinney, saw the Petitioner riding in an automobile along with two other individuals. They stopped the automobile and with the assistance of a Wilmington police officer conducted

a preliminary search of the automobile and the individuals. The Petitioner was taken to a service station rest room by Agent McKinney and the Wilmington police officer where he was searched by the said officers who found no narcotics on him. Following this search Agent Walker received additional new information from the confidential source that the Petitioner had narcotics on his person and that the confidential source had seen the contraband. Based upon this new additional information the Petitioner was taken to the New Hanover County Sheriff's Department, a search warrant was procured, and a search made of the Petitioner's person resulting in the finding of cocaine.

On page 15 of his Brief the Petitioner states:

> "In the above case there is no question that the S.B.I. officers were proper in the original search of the Petitioner, the car and other persons. The Petitioner concedes that is the Federal law and also the law of the State of North Carolina."

In making this concession, the Petitioner recognizes the established law since it has long been settled that under certain circumstances, an officer, having probable cause to believe that an automobile contains evidence of the commission of a crime may search the automobile and its passengers for such evidence without first obtaining a warrant. *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925); *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970); and *United States v. Bradshaw*, 490 F. 2d 1097 (4th Cir. 1974). In the instant case, as the Petitioner concedes, it was certainly not practical for the officers to secure a warrant at the time of the stopping of the vehicle.

Moreover, a review of the Petitioner's argument reveals that the Petitioner makes no contention that the search conducted at the New Hanover County Sheriff's Department pursuant to the search warrant was invalid. What the Petitioner does contend is that the fact that there was a second search was unreasonable and that the conducting of a second search was a violation of his Fourth Amendment rights. His sole argument is directed to what he calls the officers having two bites at the apple. The Petitioner cites no case with a factual

situation similiar to the instant case now before this Court. After a thorough search neither has this writer been able to find a case similar to the particular factual setting of this case.

In *Ker v. State of California*, supra, the Court stated that the reasonableness of a search is a substantive determination to be made by the Trial Court; however, the findings of reasonableness are not insulated from examination by the Supreme Court since they must be consistent with the protection afforded by the Fourth Amendment to the Constitution. Prior to the admission of the cocaine found on the Petitioner's person into evidence at his trial, the trial judge conducted a voir dire examination to determine the validity of the search of the Petitioner's person. During the said voir dire hearing, testimony was received from Agent Walker and the Wilmington police officer. Agent Walker specifically testified that after the service station rest room search of the Petitioner that he received new information from a confidential source that the Petitioner had drugs on his person. The confidential informant told Agent Walker that just a few minutes before they had stopped the automobile that the confidential source had seen the narcotic drugs in the possession of the Petitioner. Agent Walker testified that the confidential informant had furnished him information in the past which had been reliable. Agent Walker further testified that, based upon this information, he proceeded to the New Hanover County Sheriff's Department where he related his information to a magistrate and obtained a search warrant for the Petitioner. Upon conclusion of the voir dire examination, the trial judge found that the search warrant was valid and that the cocaine found on the Petitioner's person was properly admissible into evidence. The State of North Carolina argues and contends that the substantive determination made by the Trial Court was proper and was supported by the evidence produced during the voir dire hearing. Furthermore, the Trial Court's finding of reasonableness was consistent with the Fourth Amendment to the Constitution and the decisions of this Court.

It is obvious that the search warrant was obtained and the second search was conducted on the basis of the new information obtained from the confidential informant. It is likewise obvious that this new information obtained by Agent Walker from his confidential informer constituted probable

cause upon which to obtain the search warrant to search the person of the Petitioner. After hearing during the voir dire examination all of the evidence as to the service station rest room search and the second search with a warrant at the New Hanover County Sheriff's Department, the trial judge found the search valid, and the Petitioner should be bound by this finding of fact and conclusion of law.

The testimony of Agent Walker informed the Trial Court of the underlying circumstances from which the informant furnished the new information and from which the informant concluded that the narcotics were where he claimed they were. Agent Walker further furnished the Trial Court with some of the underlying circumstances from which he concluded that the informant was credible and his information reliable. Upon the basis of these circumstances coupled with Agent Walker's personal observations of the Petitioner, the Trial Court was completely justified in holding that at the time the search warrant was obtained the facts and circumstances within the knowledge of Agent Walker and of which he had reasonable trustworthy information were sufficient to warrant him as a reasonable and prudent man in believing that a criminal offense had been committed and was continuing to be committed. *McCray v. Illinois*, 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056 (1967).

This Court said in *Draper v. United States*, 358 U.S. 307 at page 313, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959):

> "In dealing with probable cause . . . as the very name implies we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. *Brenegar v. United States*, supra at 175. Probable cause exists where the facts and circumstances within (the arresting officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." Citation omitted.

Taking the evidence in this case Agent Walker was acting reasonably and prudently and with reasonable caution in

procuring the search warrant and conducting the second search. Agent Walker was acting on reasonably trustworthy information which was sufficient to support his belief that a criminal offense had been and was being committed. Moreover, the probable cause for issuance of the search warrant existed at the time the search was sought to be made. *United States v. Neal*, 500 F. 2d 305 (10th Cir. 1974). See also *Sgro v. United States*, 287 U.S. 206 at page 210, 77 L. Ed. 260, 53 S. Ct. 138 (1932) which states:

> ". . .It is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. . ."

Not only was there probable cause to obtain the search warrant but there was also present at the time it was obtained a grave risk of loss of the evidence. Had the search warrant not been obtained there was no basis on which to hold or charge the Petitioner. At this point the agents would have had to release the Petitioner to go on his merry way and do with the narcotic drugs whatever he pleased which may have been to consume the drugs himself but more likely would have been the commission of another criminal act by selling the cocaine. Several federal cases have held that admissions or other events occurring between the time an automobile is stopped and the time the actual search begins may be used to show probable cause for a search. *Rios v. United States*, 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960); *United States v. Gonori*, 437 F. 2d 312 (4th Cir. 1971); *Petteway v. United States*, 261 F. 2d 53 (4th Cir. 1958); *Gilliam v. United States*, 189 F. 2d 321 (6th Cir. 1951). It is not unreasonable under the Fourth Amendment to the Constitution to carry this one more logical step and say that events occurring after the stopping of the automobile and the service station rest room search in this case that being the new information from the confidential informer, can furnish the basis for probable cause to obtain a search warrant and conduct a thorough search as was done at the New Hanover County Sheriff's Department.

At this point a pertinent question to ask would be whether knowledge of related facts would constitute probable cause under the Fourth Amendment to the Constitution. Agent

Walker had seen the Petitioner earlier in Fayetteville, North Carolina, in a vehicle with two other persons. While in Fayetteville, Agent Walker had received his first information from the confidential informer. Acting on this information that the Petitioner was coming to Wilmington and that he had narcotics in his possession, Agent Walker returned to Wilmington. After Walker's return to Wilmington, he saw the Petitioner and the two other persons who were with him traveling in the vehicle on a highway north of Wilmington. At this point the information obtained from the confidential source was verified. The only information from the confidential source Agent Walker had not verified was the Petitioner's possession of narcotics. Although the preliminary service station rest room search did not yield the narcotics, Agent Walker then received new information from the confidential informer that the Petitioner had narcotic drugs on his person and the informant had seen the drugs shortly before the Petitioner's automobile was stopped. There then remained the fact of verifying the Petitioner's possession of the narcotics. This Agent Walker proceeded to do by obtaining the search warrant and searching the Petitioner at the New Hanover County Sheriff's Department. Needless to say, this search pursuant to the search warrant was fruitful.

A close look at *Draper v. United States*, supra, which is somewhat analogous to this case is now most helpful. In *Draper* one Marsh, a federal narcotics agent in Denver received information from one Hereford who had been engaged as a special employee of the Bureau of Narcotics. Hereford had from time to time given information to Marsh regarding violation of narcotic laws. Hereford's information had always proved to be accurate and reliable. Hereford gave Marsh information that Draper was in Denver at a certain address and that he was peddling narcotics. Hereford told Marsh that Draper had left for Chicago the day before and that he was going to return to Denver by train on September 8 or 9 and that he would have three ounces of heroin. Hereford gave a detailed description of Draper, described the clothes he was wearing, said that Draper was carrying a tan zipper bag and that Draper habitually walked real fast. On September 9, Marsh saw Draper alight from a train in Denver. He was wearing the clothes described by Hereford, was carrying a tan zipper bag, and was walking fast. A search of Draper revealed two bags of heroin

in his left raincoat pocket. Draper was arrested without a warrant and charged with violating the narcotics laws. The Supreme Court held that there was probable cause to arrest without a warrant and that the subsequent search of Draper and the seizure of the heroin was valid. The Court stated that Marsh had personally verified Hereford's information except for Draper's possession of heroin and said there were reasonable grounds to believe that the unverified information was likewise true.

The Petitioner makes a most interesting statement that the reason the question now before this Court has never been decided is that the facts in this particular case are so unusual that it has never had to be considered. This statement if followed by the argument that there is nothing to prevent the police from stopping an individual on reliable information, conducting a search, and then continuing to search the individual on ad infinitum with the same information being reiterated by the same informant over and over again. Obviously the Petitioner carries his argument to a ridiculous conclusion. If the case is so unique and has not occurred before, obviously it is not a problem for law enforcement personel or for individuals. More importantly, however, the Petitioner has misconstrued the facts of this case. The evidence produced at the voir dire hearing before the trial judge conclusively shows, as the trial judge found, that the information furnished by the informer the second time to Agent Walker was new information and was not merely the same information reiterated again to Agent Walker.

Finally, the Petitioner would have this Court write a new rule of law for this country. His arguments and contentions surely are not the law and cannot be the law. Moreover, were the law what the Petitioner contends and argues it to be effective law enforcement would be severely curtailed. Granted that the facts of this case are unusual and that such a factual setting may not occur often, but to hold that the search pursuant to the search warrant which produced the evidence in this case and that the conduct of Agent Walker was unreasonable under the Fourth Amendment to the Constitution would signal the beginning of a new trend in search and seizure law when carried to its ultimate conclusion would sound the death knell to effective law enforcement as we know it in this

country. To require that law enforcement officers make an election under the facts of this case, as the Petitioner contends that they should, would be a course of a conduct which should not be placed upon reasonable and prudent men whom our governmental agencies have clothed with the duties of law enforcement and such a requirement in and of itself would be most unreasonable and unwise.

CONCLUSION

It is difficult to follow the Petitioner's argument that the search pursuant to the warrant which produced the contraband is invalid simply because there has already been a prior search which he concedes was valid under the circumstances. This is particularly true when the Petitioner makes no argument or contention as to the invalidy of the search warrant itself or to the invalidity of the findings of the trial judge following the voir dire hearing. He simply makes the bold assertion that two searches which are reasonable in and of themselves when added together are unreasonable or as he put it "there should not be two bites taken at the apple." Logically it would seem to follow that validity plus validity equals validity. This writer has never known two plus two to equal anything but four. The Petitioner would have two plus two to equal five.

The conduct of Agent Walker and the searches made in this case were not unreasonable. Agent Walker was simply acting as a diligent and conscientious law enforcement officer should under the facts of this case. Had he not so acted as he did, he would have been most direlect in his duty as a law enforcement officer. The law does not and should not require a reasonable and prudent man, as Agent Walker was, to act in unreasonable and imprudent manner.

It is the position of the State of North Carolina that the Petitioner has had a fair and impartial trial free from prejudicial error. The reasonableness of any search must rise or fall upon the facts of each case. A view of all the circumstances of this case clearly shows that the test of reasonableness has been met. For the reasons set forth above, the State of North Carolina contends that this Petition for Writ of Certiorari is without merit and should be denied. With the

Petitioner's conviction thus having been weighed in the scales of justice by this court, the State of North Carolina contends that the scales are tilted in favor of the conviction and that the conviction should, therefore, be sustained.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

R. BRUCE WHITE, JR.
Deputy Attorney General

Guy A. Hamlin
Assistant Attorney General
Department of Justice
State of North Carolina
604 Northwestern Bank Building
Asheville, North Carolina 28801
Telephone (704) 254-0831

Zoro J. Guice, Jr.
Assistant Attorney General
Department of Justice
State of North Carolina
604 Northwestern Bank Building
Asheville, North Carolina 28801
Telephone (704) 254-0831

OPPOSING COUNSEL:

GEORGE H. SPERRY
Attorney at Law
110 North Fifth Avenue
Wilmington, North Carolina 28401

CERTIFICATE OF SERVICE BY MAIL

THE undersigned, Guy A. Hamlin, Assistant Attorney General, certifies that he is an attorney at law licensed to practice in the State of North Carolina, is attorney for the Department of Justice, and is a person of such age and discretion as to be competent to serve process.

That on June 18, 1975 he served a copy of the attached Answer to and Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court by placing said copy in a postpaid envelope addressed to the persons herein named, at the place and address stated below, which is the last-known address and by depositing said envelopes and contents in the United States mail at Asheville, North Carolina.

Addressee:

George H. Sperry
110 North Fifth Avenue Post Office
Box 89 Wilmington, North Carolina
28401 Attorney for Petitioner

Guy A. Hamlin

Guy A. Hamlin
Assistant Attorney General
604 Northwestern Bank Building
Asheville, North Carolina 28801
Telephone: (704) 254-0831

A-1

Judgment and Commitment

CORRECTED JUDGMENT AND COMMITMENT

STATE OF NORTH CAROLINA — In The General Court of Justice, Superior Court Division

County of New Hanover

The State of North Carolina
vs. Sam John Passarella

In open court, the defendant appeared for trial upon the charge or charges of Possession with intent to distribute cocaine and thereupon entered a plea of Not Guilty.

Having been found guilty of the offense of Possession with intent to distribute cocaine by a Jury which is a violation of _____ and of the grade of Felony.

It is ADJUDGED that the defendant be imprisoned for the term of Not less than three (3) nor more than five (5) years in the Common Jail of New Hanover County assigned to work under the supervision of the North Carolina Department of Correction.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 24th day of June, 1974.

s/ L. BRADFORD TILLERY
Presiding Judge

A-2

State's Brief in North Carolina
Court of Appeals

NO. 745SC756 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA)
)
-v-) From New Hanover
)
SAM JOHN PASSARELLA)

****

BRIEF FOR THE STATE

(Filed Sep. 16 8:22 AM'74)

****

QUESTION PRESENTED

I. DID THE TRIAL COURT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THAT WAS INTRODUCED AT THE TRIAL, VIOLATING HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES?

STATEMENT OF FACTS

The defendant, Sam John Passarella, was charged in a bill of indictment with the felonious possession of cocaine with intent to distribute and on a trial before the Honorable L. Bradford Tillery was found guilty and was given an active prison sentence of not less than three (3) nor more than five (5) years, the defendant appeals.

Agent John K. Walker of the North Carolina State Bureau of Investigation saw the defendant in Fayetteville, North Carolina, on September 18, 1973, in the presence of two other white males in a vehicle. While in Fayetteville, North Carolina, Agent Walker received information from a confidential source that the defendant had narcotics in his possession and that he was coming to the Wilmington area. Upon receiving this

information Agent Walker went to Wilmington where he met Agent McKinney also of the North Carolina State Bureau of Investigation and informed Agent McKinney of the information he had received. Agent Walker knew the confidential source as he had given him information in the past which had proven to be correct.

Agents Walker and McKinney saw the defendant in the company of two other subjects riding in a vehicle. The agents stopped the vehicle and conducted a search of the vehicle and passengers. Officer Wolak of the Wilmington Police Department and Agent McKinney took the defendant to the restroom of a nearby service station where they searched him finding no controlled substances.

However, due to the size of the restroom and the number of occupants a thorough search of the defendant was not possible. After the defendant had been searched, Agent Walker received additional new information from a confidential source who had furnished true and reliable information in the past that the defendant had methamphetamines on his person.

The officers then took the defendant to the New Hanover County Sheriff's Department where he was held while Agent Walker obtained a search warrant from the magistrate. After obtaining the search warrant, Agent Walker and Agent Hyde of the U.S. Customs took the defendant into a clinical room at the New Hanover County Jail, read the warrant to him, searched him and found cocaine on his person.

Judge Tillery conducted a voir dire examination to determine the validity of the search warrant and the ensuing search of the defendant's person. After hearing testimony from Agent Walker and Officer Wolak, Judge Tillery made findings of fact and conclusions of law in which he found the search warrant and the ensuing search of the defendant valid. Following the admission of the evidence and the jury's verdict of guilty the defendant appealed alleging the invalidity of the search.

ARGUMENT

I. DID THE TRIAL COURT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THAT WAS INTRODUCED AT THE TRIAL, VIOLATING HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES?
Assignment of Error No. 1, R p 11
Exception No. 1, R p 11.

Since the defendant does not contest the validity of the first or original search the only question for determination on this appeal is the validity of the second search. In support of his contention of the invalidity of the second search he cites two cases decided by the North Carolina Supreme Court. *State v. Ratliff*, 281 NC 397, 189 SE 2d 179 (1972) and *State v. Robbins*, 275 NC 537, 169 SE 2d 858 (1969). Neither of the cases cited by the defendant supports nor lends credence to his arguments or contention that the search in the instant case is invalid. He cites the *Robbins* case for the general principle of law that the reasonableness of the search must be determined by the facts and circumstances of each individual case. Certainly the State accepts this general principle of law and would contend that under the facts of this instant case the search of the defendant's person at the New Hanover County Jail was completely reasonable. Nowhere in the *Ratliff* case does the court intimate by dicta or otherwise that a search such as the one made of the defendant would be invalid. The *Ratliff* case involves the search of a motor vehicle only and at no time was a search ever made of Ratliff's person.

After an extensive voir dire examination during which testimony was given by two law enforcement officers one of whom was Agent Walker who was present when the defendant's vehicle was stopped and who later obtained the search warrant and conducted the search at the New Hanover County Jail, Judge Tillery made extensive findings of fact and upon his findings of fact concluded as a matter of law that the search of the defendant was valid. These facts support the conclusion that the officers had reasonable ground to believe that a felony had been committed by the defendant and that he might escape if he were not carried to the New Hanover County Jail and

a more extensive search conducted. This is especially true in view of the new or additional information received by Agent Walker from a reliable informer. Moreover, the argument could be made that the second search was merely a continuation of the original or preliminary search and that it was an incident to an arrest. *State v. Jackson*, 280 NC 122, 185 SE 2d 202 (1971). It is obvious that a thorough and proper search could not be made in a small restroom at a service station with the defendant and two officers crowded into the room. The language contained in the *Jackson* case at page 126 is appropriate to this situation:

> "Narcotics and the implements with which it is sold and used are small items that can be secreted in numerous places on the body; an adequate search obviously required greater privacy than the street corner. . ."

See also: *State v. Streeter*, 283 NC 203, 195 SE 2d 502 (1973); *State v. Roberts*, 276 NC 98, 171 SE 2d 440 (1970).

Agent Walker acting on a tip from a reliable informer had stationed himself along with other officers on a street in Wilmington to wait for the defendant who, according to the informer, had narcotics in his possession. Following the preliminary search of the defendant at the service station restroom, Agent Walker received new and additional information from the informer that the defendant had the controlled substance, methamphetamines, on his person and that the confidential source had seen a controlled substance. Accepting the defendant's arguments and contentions then at this point the officers must release the defendant since the defendant had been searched in the service station restroom. Such a contention is not the law. Moreover, had the officers acted as the defendant contends they should have, they would have breached their duties as law enforcement officers. The information furnished by the informer and the circumstances required that the officers act exactly as they did. In conducting the search at the New Hanover County Jail, they violated no constitutional right of the defendant. In fact, the defendant does not attack the validity of the search warrant or of the second search itself, but makes the broad assertion unsupported by any applicable authority on point that the second search

is invalid because of the service station restroom search. The validity of the search at the New Hanover County Jail does not depend on the search at the service station restroom but stands or falls on its own feet.

Although the statement of the case on the case on appeal does not indicate that the defendant was placed under arrest, and the trial judge did not make any such findings in his findings of fact following the voir dire examination, there is no doubt that the search at the New Hanover County Jail with or without a search warrant would be free of any questions as to validity had the defendant been placed under arrest after the vehicle in which he was a passenger was stopped. In *State v. Jones*, 9 NC App 661, 177 SE 2d 335 (1970) and *State v. Parker*, 11 NC App 648, 182 SE 2d 264 (1971) the Court of Appeals held that subsequent searches at the jail following an arrest was valid. In *Jones* the defendant was arrested as an escapee from prison and frisked down upon arrest. A search at the jail produced evidence which was used against Jones in a forgery charge. In *Jackson* the defendant was arrested for possession of narcotic drugs and a search upon his arrest failed to reveal any narcotics. A subsequent search was made of Jackson at the jail and LSD was found in his clothing. Under *State v. Jackson*, supra, the defendant could be considered to be under arrest. He was taken to the New Hanover Sheriff's Office where he was held while a search warrant was obtained and then searched. The defendant was deprived of his liberty as he certainly was not free to leave.

CONCLUSION

It is the State's position that the defendant's assignment of error is without merit. The defendant's contention not only is not the law but cannot be the law. To accept the defendant's argument would require law enforcement officers to make an election of searching at the scene or taking the suspect to the police station and searching with a warrant. Such a requirement would be a heavy burden on law enforcement personnel in the detection and investigation of criminal conduct. It is not reasonable or practical to make such a requirement of police officers. In the final analysis as the defendant concedes and as stated in *State v. Robbins*, supra, the reasonableness of the search must be determined by the facts and circumstances of

each case. For the reasons set forth above, the State contends that there was no prejudicial error in this case and that the verdict should be sustained.

Respectflly submitted this the 13th day of September, 1974.

JAMES H. CARSON, JR.
Attorney General

R. BRUCE WHITE, JR.
Deputy Attorney General

s/ ZORO J. GUICE, JR.
Assistant Attorney General

A-3

Opinion of North
Carolina Court of Appeals

A-3

STATE OF NORTH CAROLINA v. SAM JOHN PASSARELLA

No. 745SC756

(Filed 6 November 1974)

APPEAL by defendant from *Tillery*, Judge, 1 April 1974 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals 15 October 1974.

Defendant was charged with possession with intent to distribute a controlled substance, cocaine, in violation of G.S. 90-95(a) (1). Upon the jury's verdict of guilty, the trial judge imposed a sentence of not less than three years nor more than five years.

The State presented evidence which tended to show that law enforcement officers were advised by a previously reliable confidential informant that defendant had controlled substances in his possession; that on the basis of this information officers stopped an automobile in which the defendant was riding in Wilmington, North Carolina; that officers immediately conducted a strip search of defendant and all other occupants of the automobile in the rest room of a nearby service station but found no controlled substances; that following the search, officers received additional new information from the same confidential informant that he had observed a controlled substance on defendant's person a short time before the automobile was stopped; that on the basis of this new information officers took the defendant to the New Hanover Sheriff's Department where they obtained a search warrant for his person; and that officers conducted a second and more thorough search of defendant pursuant to the search warrant and found controlled substances on his person in violation of the law.

The defendant did not testify in this case nor offer any evidence. By way of cross-examination of the State's witnesses, however, defendant brought out evidence tending to show that of the three men who were in the automobile he was the only one served with a search warrant and that he was the only

one who was carried to the jail and caused to be stripped of his clothing and his body searched; that the rest room in which he initially was searched was not a place of his own choosing; and, finally, that after he was taken to the Sheriff's Department, a considerable time period elapsed before the materials which were offered into evidence were discovered.

Attorney General Carson, by Deputy Attorney General White and Assistant Attorney General Guice, for the State.

Burney, Burney, Sperry & Barefoot, by George H. Sperry, for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error relates to the denial of his motion to suppress the evidence that was introduced at trial. He does not contest the validity of the original search, but argues that the subsequent search of his person violated his constitutional rights against unreasonable searches and seizures. Defendant maintains that in these circumstances officers had the right *either* to search him immediately *or* take him to the courthouse, get a search warrant and then conduct a search. He argues that officers cannot be allowed to do both. We find no merit in this contention.

Defendant's broad assertion is unsupported by applicable law, nor do we feel such a rule should be the law. In our opinion, to require the officers to make such an election under these circumstances would place too heavy a burden on law enforcement officers in the detection and investigation of criminal conduct. We conclude it would be neither reasonable nor practical to bind law enforcement officers to an election.

Additionally, we note that on voir dire the trial judge in this case made extensive findings of fact and based on these findings concluded as a matter of law that the search of the defendant was valid. "These findings of fact by the trial judge are conclusive when, as here, they are supported by competent evidence." *State v. Bass*, 280 N.C. 435, 445, 186 S.E. 2d 384 (1972), and cases cited therein.

The trial judge's findings in this case support the conclusion that the officers had reasonable ground to believe

that a felony had been committed by the defendant and that he might escape if he were not carried to the Sheriff's Department and a more extensive search conducted, the officer having testified and the court having found as a fact that because of the restricted area of the room and the size of the occupants, the body search conducted in the rest room was not a thorough search. The new or additional information received from the informer was additional reason for a more thorough search.

No error.

Judges HEDRICK and BALEY concur.

A-4

State's Supplemental Brief in
the North Carolina Supreme Court

No. 6 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA)
)
-v-) New Hanover
)
SAM JOHN PASSARELLA)

****

SUPPLEMENTAL BRIEF FOR THE STATE

****

QUESTION PRESENTED

I. DID THE TRIAL COURT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THAT WAS INTRODUCED AT THE TRIAL, VIOLATING HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES?

STATEMENT OF FACTS

The facts in this case have been set forth in considerable detail in the record prepared for the Court of Appeals, in the appellant's brief in Court of Appeals, and in the State's brief in the Court of Appeals. It is believed that setting forth these facts again would be unnecessary repetition and would add nothing to the case here. Suffice to say, the defendant was found guilty of possession with intent to distribute cocaine, received an active prison sentence and appealed. The Court of Appeals in a unanimous decision affirmed the judgment and now the defendant seeks to appeal to the Supreme Court of North Carolina alleging a substantial question arising under the Constitution of the United States and of the State of North

Carolina or in the alternative requests this court to grant certiorari.

ARGUMENT

I. DID THE TRIAL COURT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THAT WAS INTRODUCED AT THE TRIAL, VIOLATING HIS CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES?
Assignment of Error No. 1 (R p 11)
Exception No. 1 (R p 11)

Appellant is presenting to this court the identical question which was involved in the court below. In his supplemental brief he comments about the cases cited by the State in its brief in the Court of Appeals and again cites and relies on *State v. Ratliff*, 281 NC 397, 189 SE 2d 179 (1972).

In this supplemental brief the State hereby incorporates its brief filed in the Court of Appeals and respectfully requests that this court take notice of the statement of facts and the argument set forth in that brief.

No authority other than *Ratliff* is cited by the defendant to support his contentions of what he *SHOULD BE* the law (emphasis added). The State submits that *Ratliff* does not control the facts of this case as *Ratliff* involves the search of a motor vehicle. In this case the search was made of the defendant's person and not of an automobile. In *Ratliff* a Cumberland County Deputy Sheriff, Douglas Hartley, was on patrol when he saw the defendant sitting in an automobile parked in the lot of a furniture store. The dome light of the car was on, and the defendant appeared nude. As the officer pulled into the lot the defendant started to pull out. The officer noticed the defendant make a motion like he was knocking something from his lap onto the floorboard of the car. As the officer approached the car, he saw the defendant sitting under the wheel of the vehicle with a knife in his hand. Upon laying the knife down at the officer's request, the defendant made a kicking motion as if he were kicking something under the seat. When the defendant got out, the officer reached under

the seat and found a .22 caliber revolver containing six live shells and three empty chambers.

The defendant made some statements about shooting a woman, and the officer made an examination of the defendant's car. He found a hatchet, a lady's necklace-type watch, and some wet dollar bills stuffed between the seat and console. Later that morning the officer found two empty .22 long rifle casings in the parking lot where the defendant's car had been parked, and he found an army identification card in the back seat of the patrol car where the defendant had been placed when arrested. The identification card was issued to the deceased.

At his trial the defendant contended that the warrantless search of his automobile was illegal. The court held that an automobile could be searched if there was probable cause and that probable cause existed. The court stated: "If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant." This statement is the basis for the defendant's contentions and arguments in the case now before the court.

It is obvious that *Ratliff* does not cover the instant case before the court. The defendant's contentions are not now the law of North Carolina and never have been. Nevertheless, the defendant would have this court rule according to what he contends the law should be and not on what the law is.

The State feels that if the defendant's contentions were the law, that law enforcement personnel would be hamstrung in their detection and investigation of criminal conduct. The following statement by the Court of Appeals in its opinion in this case is very appropriate:

> ". . .In our opinion, to require the officers to make such an election under these circumstances would place too heavy a burden on law enforcement officers in detection and investigation of criminal conduct. We conclude it would be neither reasonable nor practical to bind law enforcement officers to an election."

Moreover, it is not reasonable to assume that there is or will be widespread harrassment of citizens, as the defendant argues, unless law enforcement officers are required to make an election.

Certainly no one would argue that there should not be protection against unreasonable and unwarranted searches and seizures. That is fundamental in the United States and North Carolina Constitutions. As stated in *State v. Robbins*, 275 NC 537, 169 SE 2d 858 (1969) what is reasonable varies from case to case and must be determined by the facts and circumstances of each individual case. Viewing all the facts and circumstances of this case the second search was reasonable in the protection of the rights of the public and not unreasonable in the protection of the individual citizen in his privacy. Justice Pless put it this way in *State v. Bumpers*, 270 NC 521, at p 530, 155 SE 2d 173 (1967):

> "The object of government is to protect the rights of the public–the people. Otherwise, there is no reason for it– and the individual would have to protect his home, his possessions, and his family. In protecting the public, we must always remember that innocent persons may be unjustly accused, and their rights, too, must be safeguarded. But we must not become too zealous in protecting the accused that we overlook and ignore those who have been robbed, raped and murdered.
>
> "The United States and North Carolina Constitutions wisely and properly inhibit unreasonable and unwarranted searches. These provisions are not intended to shield the criminal–they are to protect the innocent citizen in his privacy, and to make every man's home his castle. They should not give to a criminal an impenetrable fortress in which he can barricade himself against all guilt."

Furthermore, as stated by the Court of Appeals, the trial judge held a voir dire hearing and made findings of fact and conclusions of law based on the findings of fact. These findings

of fact were supported by competent evidence and are conclusive. *State v. Bass*, 280 NC 435, 186 SE 2d 384 (1972).

It should be noted, as pointed out by the Court of Appeals in its opinion and also found by the trial judge in his findings of fact, that the first search was not a thorough one as it was conducted in a service station restroom with limited space and with several persons present. Moreover, additional new information was received after the initial search causing the officers to take the defendant to the New Hanover Sheriff's Department, obtain a search warrant, and conduct a thorough search of the defendant. Had the officers not acted as they did, they would have been derelect in their duties as law enforcement officers.

CONCLUSION

It is the appellee's contention before this court, as it was before the Court of Appeals, that the appellant's Assignment of Error is without merit. His contention not only is not the law but cannot be the law. For the reasons set forth above and in the brief filed in the Court of Appeals, the State, appellee, contends that there was no prejudicial error committed in the trial of this case and that the judgment appealed from should be affirmed.

Respectfully submitted this 13th day of December, 1974.

RUFUS L. EDMISTEN
Attorney General

R. BRUCE WHITE, JR.
Deputy Attorney General

s/ Zoro J. Guice, Jr.
Assistant Attorney General
604 Northwestern Bank Building
Asheville, North Carolina 28801
(704) 254-0831

A-5

Judgment of North
Carolina Supreme Court

No. 6 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA	)	JUDGMENT
	)	DISMISSING APPEAL
-v-	)	
	)	
SAM JOHN PASSARELLA	)	(745SC756)

****

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed:

And it is considered and adjudged further that the defendant do pay the sum of THIRTY-SIX and 15/100 ($36.15) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this the 30th day of December, 1974.

Adrian J. Newton
Clerk of the Supreme Court
of North Carolina

By:

John R. Morgan
Assistant Clerk

cc: Burney, Burney, Sperry & Barefoot, Attorneys at Law
R. Bruce White, Jr., Deputy Attorney General
Zoro J. Guice, Jr., Assistant Attorney General
W. Allen Cobb, District Attorney

A-6

Constitutional and Statutory Provisions Involved

CASE CITATIONS

Carroll v. United States,
267 U.S. 132, 69 L. Ed. 543,
45 S. Ct. 280 (1925)

Chambers v. Maroney,
399 U.S. 42, 26 L. Ed. 2d 419,
90 S. Ct. 1975 (1970)

Draper v. United States,
358 U.S. 307, 3 L. Ed. 327,
79 S. Ct. 329 (1959)

Gilliam v. United States,
189 F. 2d 321 (6th Cir. 1951)

Gilliam v. United States,
374 U.S. 23, 10 L. Ed. 2d 726,
83 S. Ct. 1623 (1963)

McCray v. Illinois,
386 U.S. 300, 18 L. Ed. 2d 62,
87 S. Ct. 1056 (1967)

Mapp v. Ohio,
367 U.S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961)

Miller v. United States,
357 U.S. 301, 2 L. Ed. 2d 1332,
78 S. Ct. 1190 (1958)

Petteway v. United States,
261 F. 2d 53 (4th Cir. 1958)

Rios v. United States,
364 U.S. 253, 4 L. Ed. 2d 1688,
80 S. Ct. 1431 (1960)

Sgro v. United States,
287 U.S. 206, 77 L. Ed. 260,
53 S. Ct. 138 (1932)

United States v. Bradshaw,
490 F. 2d 1097 (4th Cir. 1974)

United States v. Gonori,
437 F. 2d 312 (4th Cir. 1971)

United States v. Neal,
500 F. 2d 305 (10th Cir. 1974)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States

Fourth Amendment to the Constitution of the United States

Title 28 of the United States Code, Section 1257 (3)